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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON 25

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B-144579

February 1, 1961

AIRMAIL

Judge Herman E. Moore
P. O. Box 720
St. Thomas, Virgin Islands

Dear Judge Moore:

In your letter of November 30, 1960, you say you retired three years ago at the age of 65 as Judge of the District Court of the Virgin Islands in accordance with 28 U.S.C. 373, and are receiving from the United States an "annuity" of full salary in accordance therewith. You say that since there is no provision in the United States Code for further judicial service, you are interested in how much public service you can perform without affecting your "annuity." Specifically, you request our decision on the following questions:

"1. Can a territorial Judge, who is retired under Section 373, Title 28, U.S.C., accept another position with the United States which carries a fixed salary, by waiving the fixed salary of that position, and retain his annuity under Section 373, Title 28?

"2. If the answer to the above question is in the affirmative, and if the position accepted carried such conveniences as an office and living quarters, and use of automobile and chauffeur, and servants, could those services be accepted or would they be considered part salary?

"3. Can such a retired Judge accept appointment to a mission by the State or other departments which carries no salary but which pays travel and living expenses in a foreign country, and still retain his annuity?

"4. Am I correct in assuming that such a retired Judge may accept appointment on boards or commissions in the United States or the Virgin Islands which carry no salary or compensation whatever?

"5. Is there any other governing factor except that such a retired Judge may not receive both his annuity and a salary from the United States at the same time?"

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The act of July 31, 1894, 28 Stat. 205, as amended, 5 U.S.C. 62, provides:

"No person who holds an office the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars shall be appointed to or hold any other office to which compensation is attached unless specially authorized thereto by law; but this shall not apply to retired officers of the Army, Navy, Air Force, Marine Corps, or Coast Guard whenever they may be elected to public office or whenever the President shall appoint them to office by and with the advice and consent of the Senate. Retired enlisted men of the Army, Navy, Air Force, Marine Corps, or Coast Guard retired for any cause, and retired officers of the Army, Navy, Air Force, Marine Corps, or Coast Guard who have been retired for injuries received in battle or for injuries or incapacity incurred in line of duty shall not, within the meaning of this section, be construed to hold or to have held an office during such retirement."

28 U.S.C. 373 provides in pertinent part that:

"Any judge of the United States District Court for the District of Puerto Rico, the United States District Court for the District of the Canal Zone, the District Court of Guam, or the District Court of the Virgin Islands, who resigns after attaining the age of seventy years and after serving at least ten years, continuously or otherwise, or after attaining the age of sixty-five years and after serving at least fifteen years, continuously or otherwise, shall continue during the remainder of his life to receive the salary he received when he relinquished office.
* * *

As you say, there is no provision in the United States Code for further judicial service by you. Moreover, 28 U.S.C. 373 specifically refers to the "office" as having been "relinquished." Thus, you no longer hold the office of Judge of the District Court of the Virgin Islands; and the dual employment limitation in the act of July 31, 1894, would not prohibit you from accepting other employment with or an appointment to an office of the United States.

The question then arises whether the payments to which you are entitled under 28 U.S.C. 373 constitute salary within the meaning of the act of May 10, 1916, 39 Stat. 120, as amended, 5 U.S.C. 58, which specifies that:

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"Unless otherwise specifically authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one salary when the combined amount of said salaries exceeds the sum of \$2,000 per annum."

Our view is that the monetary payments provided by Congress under 28 U.S.C. 373 to judges of the courts listed therein do not constitute salary within the meaning of the act of May 10, 1916, and that the word salary is used in 28 U.S.C. 373 to denote the rate at which the payments shall be made.

Although there is no statutory prohibition against payment of the amounts provided by 28 U.S.C. 373 at the same time that the recipient is drawing the salary of a position in which he is rendering service, the concurrent payment of the amounts provided by 28 U.S.C. 373 and the salary of a position in which an individual is rendering service would, as you indicate, be inconsistent with the basic policies regarding the dual payment of retirement annuity and salary as expressed in civilian retirement legislation and without authority of law. See in that regard 16 Comp. Gen. 121, in which we held that, although there was no statutory prohibition against the reemployment in the Executive civil service of a Foreign Service Officer, not of automatic retirement age, retired for disability, there was no authority for the concurrent payment of his retirement annuity during the period of such employment. The claimant involved in that decision obtained judgment in his favor in the Court of Claims. See Brunswick v. United States, 90 Ct. Cl. 285 (1940). In 32 Comp. Gen. 89 we declined to follow the Brunswick decision and affirmed the holding in 16 Comp. Gen. 121. (Note: The amount of salary and annuity any retired Foreign Service Officer or employee may receive if reemployed in Federal service is now specified in section 872 of the Foreign Service Act of 1946, as added by section 44 of the Foreign Service Act Amendments of 1960, 74 Stat. 846.)

Consequently, in accordance with the views expressed in 32 Comp. Gen. 89, you may not be paid the amounts provided by 28 U.S.C. 373 while serving in a salaried position in the Federal service. Moreover, and in specific reply to your first question, when the salary of an office or position is fixed, there can be no valid waiver of all or part of the salary so fixed. See 26 Comp. Gen. 956, copy attached. Question 1 is answered accordingly.

In view of our answer to question 1, question 2 requires no answer.

Regarding questions 3 and 4, authorized travel expenses, which ordinarily would include living expenses, are, in general, not considered as salary or compensation, and neither the act of July 31, 1894, nor the act of May 10, 1916, would preclude you from accepting such appointments.

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Therefore, in the absence of any restriction applying to a particular appointment, the questions are answered in the affirmative.

Question 5, generally, is answered in the negative; but as to specific appointments, other factors of which we are not now aware might require consideration.

Very truly yours,

FRANK H. WEITZEL

Assistant Comptroller General
of the United States

Enclosure ✓